No. 91-1010

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Petitioner,

v.

METCALF & EDDY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

BRIEF OF AMICI CURIAE, THE STATES OF OHIO, ARKANSAS, CALIFORNIA, FLORIDA, ILLINOIS, INDIANA, KANSAS, MAINE, MICHIGAN, MONTANA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OREGON, RHODE ISLAND, UTAH, VERMONT, WISCONSIN AND THE COMMONWEALTHS OF MASSACHUSETTS, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, AND PUERTO RICO.

LEE FISHER
ATTORNEY GENERAL OF OHIO

PATRICK A. DEVINE
(Counsel of Record for Amici Curiae)
ANDREW I. SUTTER
Assistant Attorneys General
Chief Counsel's Staff
30 East Broad Street, 15th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

Counsel for Amici Curiae
In Support of Petitioner

(Additional List of Counsel on Inside Page)

Of Counsel:

Honorable Winston Bryant
Attorney General
State of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201

Honorable Daniel E. Lungren
Attorney General
State of California
Suite 511
1515 K Street
Sacramento, California 95814

Honorable Robert A. Butterworth
Attorney General
State of Florida
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050

Honorable Roland W. Burris
Attorney General
State of Illinois
500 South Second Street
Springfield, Illinois 62706

Honorable Linley E. Pearson
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204

Honorable Robert T. Stephan
Attorney General
State of Kansas
2nd Floor, Judicial Center
Topeka, Kansas 66112-1597

Honorable Michael E. Carpenter
Attorney General
State of Maine
Statehouse
Augusta, Maine 04330

Honorable Scott Harshbarger
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Honorable Frank J. Kelley
Attorney General
State of Michigan
P.O. Box 30212
Lansing, Michigan 48909

Honorable Marc Racicot
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1430

Honorable Robert J. Del Tufo
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

Honorable Lacy H. Thornburg
Attorney General
State of North Carolina
Department of Justice
2 East Morgan Street
P.O. Box 629
Raleigh, North Carolina 27602

Honorable Nicholas J. Spaeth
Attorney General
State of North Dakota
600 East Boulevard
State Capitol
Bismark, North Dakota 58505-0040

Honorable Robert C. Naraja
Attorney General
Commonwealth of the Northern
Mariana Islands
2nd Floor - Administration Bldg.
Capitol Hill
Saipan, MP 96950

Honorable Dave Frohnmayer
Attorney General
State of Oregon
100 Justice Building
Salem, Oregon 97310

Honorable Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania
15th Fl., Strawberry Square
Harrisburg, Pennsylvania 17120

Honorable Jorge E. Perez Diaz
Attorney General
Commonwealth of Puerto Rico
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902

(Additional Counsel on Back Cover)

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INTEREST OF THE AMICI CURIAE

The State of Chio, joined by the states and commonwealths identified above, submits this brief *amici curiae* in support of the petitioner, urging this Court to grant the petition for writ of certiorari and reverse the holding of the court below. This case provides the Court with the opportunity to address a conflict between the First Circuit Court of Appeals and several other circuits, resolving whether district court orders denying states' motions to dismiss predicated on the eleventh amendment are immediately appealable under the collateral order doctrine. The issue presented affects the litigation

resources of all states and the dockets of all United States district courts. Thus, the states have a significant interest in the resolution of this matter.

STATEMENT OF THE CASE

The facts set forth herein are taken from the First Circuit's decision below. *See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority,* 945 F.2d 10 (1st Cir. 1991). The Puerto Rico Aqueduct and Sewer Authority (PRASA) was established by the Puerto Rico legislature as "a public corporation and an autonomous government instrumentality" to provide drinking water and sanitary sewage service to the inhabitants of Puerto Rico. 22 L.P.R.A. §§142, 144 (1987).

In 1986, PRASA entered into a contract with Metcalf & Eddy, Inc. (Metcalf), an engineering firm, to provide extensive services to bring eighty-three of PRASA's facilities into compliance with federal "clean water" standards. Later, Metcalf and PRASA had contract disputes and in 1990 Metcalf filed a diversity action against PRASA in the United States District Court for the District of Puerto Rico for a declaration of the parties' contractual rights and for $52,000,000 in damages for breach of contract.

PRASA filed in the district court a motion to dismiss based on its immunity from suit under the Eleventh Amendment to the United States Constitution. The district court denied the motion to dismiss and ordered PRASA to answer the complaint. PRASA took an immediate appeal to the First Circuit and requested a stay of the district court proceedings. The First Circuit denied the stay and later, as reported in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority,* 945 F.2d 10 (1st Cir. 1991), dismissed PRASA's appeal for want of federal jurisdiction under 28 U.S.C. §1291. Relying upon its earlier decision in *Libby v. Marshall,* 833 F.2d 402 (1st Cir. 1987), the First Circuit held that the denial of a state's eleventh amendment claim of immunity from suit does not confer a right to an immediate appeal. The First Circuit explicitly acknowledged that four other circuit courts of appeals had held otherwise.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with decisions issued by every other United States court of appeals to address whether an immediate appeal lies from an interlocutory order denying a state's claim of immunity predicated on the eleventh amendment.

2. The decision of the court below upsets the balance between the federal government and the states maintained by the eleventh amendment. This case, therefore, presents a question of national importance that should be settled by this Court.

REASONS FOR GRANTING THE WRIT

The First Circuit's holding that interlocutory orders disposing of eleventh amendment claims are not immediately appealable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), denies states and their agencies immunity from suit in federal court. This ill-conceived holding directly affecting the important relationship between the eleventh amendment and federal appellate jurisdiction is in conflict with the decisions of every other circuit court to address the issue. It also ignores compelling language found in many of this Court's cases discussing the scope of the protection afforded states by the eleventh amendment. Accordingly, this Court's full review of this case is warranted.

1. The Decision Below Creates A Conflict Between Circuits

Every other circuit court to address the issue has concluded, contrary to the decision of the First Circuit, that an immediate appeal is available when a state's assertion of eleventh amendment immunity is rejected by a district court. *See Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987); *Dube v. State University of New York*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Board of Education*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied*, 492 U.S. 976 (1989); *Loya v. Texas Department of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Chrissy F. By Medley v. Mississippi Department of Public Welfare*, 925 F.2d 844 (5th Cir. 1991); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds, Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766); *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, ___ U.S. ___ , 112 S.Ct. 377 (1991); and *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

As noted by the Second Circuit in *Minotti*, 798 F.2d at 608:

> the Supreme Court has held that denial of a substantive claim of absolute immunity may be appealable before final judgment. [citation omitted]. More recently, the Court has applied the collateral order doctrine to 'denial of a claim of qualified immunity . . . [citation omitted]. In the case of an absolute immunity such as that provided by the eleventh amendment, the essence of the immunity is the possessor's right not to be haled into court - a right that cannot be vindicated after trial . . . ."

The Second Circuit's reasoning is compelling: the eleventh amendment prohibits the exercise of federal judicial power over the states, not merely the power of federal courts to impose judgments. Even in cases authorized by this Court's landmark decision in *Ex Parte Young*, 209 U.S. 123 (1908), suit must be brought against a state official, not a state. Indeed, the "fiction" of *Ex Parte Young* - prospective relief sought from a state official in his official capacity is not a suit against the state - was made necessary because of the existence of the eleventh amendment. Unlike courts in the Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits, the lower court failed or refused to recognize this fact.

The First Circuit's interpretation of the eleventh amendment is irreconcilable with the interpretation adopted by other circuits. In light of these discordant opinions, this case presents this Court with an ideal opportunity to resolve a conflict between the courts of appeals that is "sufficiently crystalized to warrant certiorari if federal law is to be maintained in any satisfactory uniform condition." *Beaulieu v. United States,* ___ U.S. ___ , 110 S.Ct. 3302, 3303 (1990) (White, J., dissenting from denial of petition for writ of certiorari).

2. This Case Presents A Question Of National Importance That Should Be Settled By This Court

"[T]his Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974) (citations omitted). The First Circuit's decision, however, has the effect of transforming the Court's phrase, "immune from suit," into "judgment proof after trial," thereby distorting the nature of eleventh amendment immunity. A comparison of the majority and concurring opinions in *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 110 S.Ct. 1868 (1990), highlights this distortion.

In *PATH,* two of the defendant's employees allegedly were injured on the job and sought to recover damages under several federal statutes. At issue before this Court was whether the states of New York and New Jersey, which had created PATH, had in the process waived PATH'S immunity from suit. A unanimous Court held that they had. The Court split, however, over the proper characterization of eleventh amendment immunity.

The majority, speaking in the same broad terms the Court utilized in *Edelman,* reiterated that consistent with the eleventh amendment "an unconsenting State is immune from suits brought in federal courts . . . ." *PATH,* 110 S.Ct. at 1872 (citations omitted). The concurrence objected to the breadth

of this interpretation, opining that "the Eleventh Amendment secures States only from being *haled into federal court* by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity." *PATH,* 110 S.Ct. at 1875 (Brennan, J., concurring) (emphasis added).

Clearly, whatever dispute exists between members of this Court concerning the nature of eleventh amendment immunity, it does not involve whether the amendment protects states "from being haled into federal court," but, rather, whether that protection extends beyond diversity actions. Thus, if the immunity offered by the eleventh amendment is immunity from being haled into court, then the First Circuit's position that a state's right to be immune from suit in federal court "can be adequately vindicated upon appeal from a final judgment" plainly is wrong.[1]

The lower court's holding that there can be no immediate appeal from an order denying a motion to dismiss predicated on the eleventh amendment, in addition to being conceptually incorrect, will produce undesirable jurisprudential results. Quite often, a state and its officials will be named as defendants in a federal lawsuit for monetary relief. It is quite likely that the officials will assert either absolute or qualified immunity and that the state will assert eleventh amendment immunity.

If the assertions of immunity made by the officials and the state are rejected by the district court, then, consistent with earlier opinions of this Court, the officials will be able to take an immediate appeal. The state, however, because of the First Circuit's holding in this case, will not be permitted to appeal immediately.

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[1] Either the majority or concurrence's interpretation in *Path* of the eleventh amendment would justify summary reversal. *See Mireles v. Waco,* ___ U.S.___ , 112 S.Ct. 286, 290 (1991) (Scalia, J., dissenting) (summary reversal appropriate when "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error") (citations omitted).

If the court of appeals reverses the denial of the officials' motion to dismiss, those officials will be dropped from the case. The state, on the other hand, will be forced to endure the burdens of a trial despite the fact that any judgment entered against it will be unenforceable.

If the states cannot appeal orders denying their eleventh amendment claims until after trial, the right to be protected from a lawsuit in federal court is destroyed. Eleventh amendment immunity, therefore, must be treated as are immunities for officials - immunity from suit, not just monetary liability. *See Mireles v. Waco*, ___ U.S. ___ , 112 S.Ct. 286, 288 (1991) (per curiam) ("official immunity is immunity from suit, not just from ultimate assessment of damages").

The eleventh amendment represents a "fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). The decision of the court below disrupts this balance by shifting its fulcrum to one side. Thus, this Court is presented with a timely opportunity to preserve this fundamental constitutional balance and continue its explication of the relationship between immunity defenses and the collateral order doctrine. This case, therefore, warrants this Court's plenary review.

CONCLUSION

For the preceding reasons, amici curiae urge this Court to grant the writ of certiorari sought by Petitioner.

Respectfully submitted,

LEE FISHER
ATTORNEY GENERAL OF OHIO

PATRICK A. DEVINE
(Counsel of Record for Amici Curiae)
ANDREW I. SUTTER
Assistant Attorneys General
Chief Counsel's Staff
30 East Broad Street, 15th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

Counsel for Amici Curiae
In Support of Petitioner

February 1992

Honorable James E. O'Neil
Attorney General
State of Rhode Island and
Providence Plantations
72 Pine Street
Providence, Rhode Island 02903

Honorable Paul Van Dam
Attorney General
State of Utah
State Capitol
Salt Lake City, Utah 84114

Honorable Jeffrey L. Amestoy
Attorney General
State of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Honorable James E. Doyle
Attorney General
State of Wisconsin
114 East, State Capitol
Post Office Box 7857
Madison, Wisconsin 53707-7857